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No. 97-81

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

THE DELAWARE RIVER AND BAY AUTHORITY,
Petitioner,
v.
INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 68, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT

The petitioner Delaware River and Bay Authority (Authority or DRBA) is "an agency of government of the State of Delaware and the State of New Jersey" created by the Delaware-New Jersey Compact. Pet. App. 56a.

Acting pursuant to the judicial authority vouchsafed by Article XV of the Compact, the New Jersey Supreme Court held that under Article VIII of the Compact, since "the laws of New Jersey and Delaware are substantially similar concerning the right of public employees to negotiate collectively," the Authority is legally obligated to recognize the collective negotiation right of its employees. App. 1a-2a, 13a. The New Jersey court accordingly affirmed the decision of the New Jersey Appellate Division remanding this case to the trial court "to determine how the complementary labor policies of New Jersey

and Delaware, as expressed in their parallel labor legislation, are to be effectuated." Pet. App. 30a.

ARGUMENT

This case presents a single, mundane question of the proper construction of the Delaware-New Jersey Compact —not, as the petition for certiorari would have it, "a basic constitutional question of overriding importance to the interstate compact device," Pet. 11. That compact construction question is rendered even more mundane by the fact that the decision below is consistent with *both* the New Jersey courts' long-standing construction of the Delaware-New Jersey Compact *and* with the Delaware courts' construction of the Compact.

And, while the petition for certiorari struggles mightily to generate a conflict, the approach of the New Jersey courts and the Delaware courts to the construction of the Compact between these States is consistent with the approach of the other appellate courts that have confronted this kind of issue. Conversely, the petition is not able to muster a single authority in support of its understanding of how settlor states, regardless of what a compact provides, must legislate with respect to public bodies created by interstate compacts.

The petition for certiorari should therefore be denied.

1. The "basic constitutional question" that the petition claims to be presented by this case is "whether the courts of one state unilaterally may subject an interstate compact authority to additional duties or obligations implied from the general laws or policies of the compact states, when . . . doing so would contravene express terms of the compact without the actual consent of the compact states or Congress." Pet. 12. This case does *not* raise this question, and, not surprisingly, the New Jersey Supreme Court did *not* undertake to answer any such question.[1]

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[1] Indeed, far from "answering that question in the affirmative," Pet. 12, the New Jersey Supreme Court recognized that "[a] single

Rather than seeking to override the Compact in any way, the New Jersey Supreme Court exercised the judicial authority expressly provided by Article XV of the Compact to construe Article VIII of the Compact in accord with its express language. Article XV of the Compact provides:

> Judicial proceedings to review any by-law, rule, regulation, order or other action of the Authority . . . may be brought *in such court of each State,* and pursuant to such laws or rules thereof, as a similar proceeding with respect to any agency of such State might be brought. [Pet. App. 65a (emphasis added).]

Article VIII of the Compact provides:

> For the purposes of effectuating the authorized purposes of the Authority, additional powers may be granted to the Authority by legislation of either State without the concurrence of the other, and may be exercised within such State, . . .; but *no additional duties or obligations shall be undertaken by the Authority under the law of either State* or of Congress *without authorization by the law of both States.* [Pet. App. 61a (emphasis added).]

What Article VIII means, said the New Jersey Supreme Court, is that "the two states may subject DRBA to complementary or parallel legislation." Pet. App. 12a. In other words, such legislation is the "authorization by the law of both States" that, under the Compact, does work to impose "additional duties and obligations" on the Authority.

That being so, the New Jersey Supreme Court held that the Authority "may be subject to complementary or parallel legislation that does not intrude upon the mission of the agency." Pet. App. 10a, quoting *Ampro Fisheries, Inc. v. Yaskin,* 127 N.J. 602, 606 A.2d 1099, 1103 (1992). And, as the New Jersey court recognized, en-

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state may not unilaterally impose additional duties on a bi-state agency." Pet. App. 9a.

gaging in collective negotiations with the chosen representative of the DRBA employees does not in any way interfere with the mission of the Authority. Pet. App. 13a. Under New Jersey and Delaware law, the duty to engage in collective negotiations requires only that the parties confer in good faith with a desire to reach a mutually acceptable agreement; neither party is required to agree to a proposal. *See In the Matter of Hunterdon Country Bd. of Ed.*, 116 N.J. 322, 561 A.2d 597, 605 (1989); Title 19 Del. C. § 1302(d).

It is very much to the point in this regard that the courts of New Jersey and Delaware have long recognized that the Authority's labor relations are to be governed by the "substantially similar" laws of both States. Pet. App. 10a. Three years after the Authority was created, the New Jersey Supreme Court sustained an injunction against strike activity by DRBA employees. *Delaware River and Bay Authority v. International Organization of Masters, Mates & Pilots*, 45 N.J. 138, 211 A.2d 789 (1965). The New Jersey court dismissed the argument that, as the product of an interstate compact, the DRBA could not get such an injunction, and did so on grounds that are consistent with its opinion in this case:

> The fact that the Authority is designated as a bi-state agency, rather than an agency of New Jersey alone, has no materiality at least where, as here, *there is no indication that the historic and widely prevailing policy against strikes by public employees is not equally applicable in both states.* [211 A.2d at 794 (emphasis added).]

One year later, the Delaware Chancery Court applied the same mode of analysis in determining that DRBA employees did not have the right to engage in collective negotiations pursuant to the Delaware public employee bargaining law *because New Jersey, at that time, had not similarly extended collective negotiation rights to public employees. Delaware River & Bay Authority v. Carello*, 222 A.2d 794 (Del. Ch. 1966). The Delaware court

noted that, under the laws of Delaware, "the Authority would [be] require[d] . . . to recognize an exclusive bargaining agent" of its employees. *Id.* at 799. Referring to Article I, § 19 of the New Jersey Constitution, the Delaware court further noted, however, that "according to New Jersey judicial interpretation of its constitutional provision, there are incidents to collective bargaining . . . not appropriate to the public employment field. . . ." *Id.* (internal quotation marks and citation omitted). The Delaware court therefore concluded:

> The Delaware statute in issue cannot . . . be applied to the Authority *in view of the New Jersey constitutional provision.* [*Id.* (emphasis added).]

And, the Delaware court went on to explain:

> [t]he Delaware statute in issue must remain ineffective *until concurrent legislative action of a similar nature is taken by the State of New Jersey.* [*Id.* (emphasis added).]

As the New Jersey Supreme Court noted, two years after *Carello* "the New Jersey Legislature passed public employment legislation," which "constitutes concurrent legislative action." Pet. App. 11a-12a. With New Jersey's enactment of this legislation, the New Jersey court concluded, "the New Jersey and Delaware legislatures ha[d] adopted a substantially similar policy concerning collective negotiations by public employees." Pet. App. 13a. And, the court below concluded that "the failure to apply so important a policy to an entity created by both states for their mutual benefit" would be "[a]nomolous." *Id.*[2]

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[2] The Authority argues that "Article VII(e) of the Compact, vesting in DRBA the authority to fix the terms and conditions of employment . . . was 'intended to keep matters concerning labor relations and collective negotiations in the hands of the DRBA.'" Pet. 9, quoting Pet. App. 15a (Garibaldi, J., dissenting). That, of course, was not the Authority's understanding when it brought the labor injunction proceeding in the *Masters, Mates & Pilots* case. And, while Article VII(e) provides that the Authority is empowered to "fix and determine . . . conditions and terms of employment,"

The approach of the Delaware and New Jersey courts to this question represents the application in the area of labor relations of the well-established principles that "[b]i-state agencies . . . do not exist in a vacuum and are not immune from regulation" and that "member states can pass substantially similar legislation, as contemplated by the compact." *Delaware River Port Authority v. Commonwealth*, 137 Pa. Commw. 170, 585 A.2d 587, 588 (1991). *See, e.g., Redbird Engineering Sales, Inc. v. Bi-State Development Agency*, 806 S.W.2d 695, 701 (Mo. Ct. App. 1991); *State of Washington v. Svenson*, 104 Wash.2d 533, 707 P.2d 120, 124 (1985).[3]

2. As contrary authority, the certiorari petition relies heavily upon a per curiam opinion of the New York Court of Appeals holding that article 23-A of New York's Correction Law was not intended to apply to the Waterfront Commission of New York Harbor. *Malverty v. Waterfront Commission of New York Harbor*, 71 N.Y.2d 977,

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Pet. App. 69a, nothing in the Compact provides that in so doing the Authority must act unilaterally and outside all systems of legal regulation or that the Authority is precluded from engaging in negotiations, collective or individual, and from entering into binding contracts. The New Jersey Supreme Court thus quite properly rejected the reading of Article VII(e) advanced by the Authority. Pet. App. 11a.

[3] The certiorari petition demonstrates its misunderstanding of the deicsion below when it describes the New Jersey Supreme Court as "rul[ing] that one state's court may subject a bi-state agency to the 'complementary or parallel legislation' of both states under an implied-consent theory." Pet. 8. Implied consent by the bi-state agency is an *alternative* ground—*not* relied upon by the court below—for subjecting the agency to particular state regulation. Pet. App. 10a-11a ("If the creator states do not enact complementary or parallel legislation, a court must make additional findings before concluding that the bi-state agency impliedly consented to regulation by one creator state.), citing *Eastern Paralyzed Veterans v. City of Camden*, 111 N.J. 389, 545 A.2d 127, 134 (1988) ("If the New Jersey regulatory system is not 'complementary' to Pennsylvania's, then we believe that additional findings must be made before we can conclude that the DRPA has impliedly consented to provide elevator access to its train platform.").

524 N.E.2d 421 (1988). But *Malverty*, too, turned on a narrow interpretative question—and not on any grand Compact Clause issue—albeit a question of the proper interpretation of the New York statute at issue there.

In *Malverty*, the New York court observed that "[i]n the past, the New York Legislature has expressly stated that certain legislation was amending a certain portion of the 'Compact' and that the new law would take effect upon the enactment into law by New Jersey of legislation having an effect identical to New York's legislation, unless New Jersey had already done so, in which case the amendment would take effect immediately." 524 N.E.2d at 422. And, the New York court concluded "that *the New York Legislature never intended* article 23-A to apply to the Waterfront Commission," based on the following indicia of the Legislature's intent: "the absence from the text and legislative history of article 23-A of any reference to the Waterfront Commission, coupled with the absence of an express statement that the Legislature was amending or supplementing the provisions of the 'Compact' and that article 23-A would take effect upon the enactment by New Jersey of legislation of identical effect, if it had not already done so. . . ." *Id.* (emphasis added).

The certiorari petition does not claim that the New Jersey court has misunderstood the intent of the New Jersey legislature. Thus, the holding and rationale of *Malverty* have no pertinence here. Nor is the petition's argument advanced by the observation of the *Malverty* court that the New York legislature's approach to enacting legislation governing the Waterfront Commission is required by "the express terms of 'the Compact' . . . ." 524 N.E.2d at 422. As we have seen, both the Delaware and New Jersey courts have concluded that the relevant terms of the Compact here *are* satisfied by the enactment of substantially similar legislation in both States.

The remaining appellate court decisions cited by the petition (at pp. 18-20 & 27-28) as creating a conflict are

not, in fact, contrary to the New Jersey Supreme Court's decision here. The cited decisions that do address the application of parallel or complementary legislative enactments to bi-state agencies accept the approach of the court below, while finding the legislation in question is not parallel or complementary.[4] And, the other cited decisions stand for the unexceptional proposition—recognized by the New Jersey Supreme Court—that the law of *one* settlor state *standing alone* is not applicable to a bi-state agency.[5] As the petition does not challenge the finding of the court below that the Delaware and New Jersey laws are parallel and complementary, none of the cited decisions are in conflict with the decision below.

3. At bottom, it is the theory of the certiorari petition that the application of state legislation to a bi-state entity

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[4] *Delaware River Port Authority v. Commonwealth*, 585 A.2d at 588 ("Neither is it contended that Pennsylvania and New Jersey have passed substantially similar legislation, as contemplated by the compact."); *Nardi v. Delaware River Port Authority*, 88 Pa. Commw. 558, 490 A.2d 949, 952 n.10 (1984) ("additional distinguishing features between these two statutes further prevented them from being 'substantially similar' legislative acts"); *Delaware River & Bay Authority v. Carello*, 222 A.2d at 799 ("the Delaware [public sector collective bargaining] statute . . . must remain ineffective until concurrent legislative action of a similar nature is taken by the State of New Jersey"). *See also Agesen v. Catherwood*, 26 N.Y.2d 521, 260 N.E.2d 525 (1970) (refusing to apply New York law to the Port Authority because of "a general intent, amply reflected in the compact, that the internal operations of the Authority be independent of the direct control of either State acting without the concurrence of the other").

[5] *Salmon For All v. Dept. of Fisheries*, 118 Wash.2d 270, 821 P.2d 1211, 1215-16 (1992) (Washington's Open Public Meetings Act does not apply to meeting pursuant to the Columbia River Compact); *Seattle Master Builders v. Pacific Northwest Electric & Power Planning Council*, 786 F.2d 1359, 1371 (9th Cir. 1986) (Council is not required to prepare an environmental impact statement pursuant to Washington environmental protection statute). *See also Klickitat County v. Washington*, 71 Wash. App. 760, 862 P.2d 629 (1993) ("land use requirements" adopted pursuant to interstate compact "are not a state program" within meaning of Washington law).

"requires the legislative consent of both states and Congress." Pet. 16. *See also id.* 13-14. However, the petition cites not one decision that reads the Compact Clause to so limit the authority of settlor states to provide in their compacts for the regulation of a bi-state entity. Even *Malverty*, on which the petition places principal reliance, would not require Congressional approval of concurrently enacted legislation intended by the States of New York and New Jersey to apply to the Waterfront Commission. Under the Compact Clause, Congressional approval is only necessary to amend the express terms of a compact or to increase the authority of the bi-state agency in a manner that enhances state power at the expense of federal supremacy. *See Cuyler v. Adams*, 449 U.S. 433, 438-442 (1981). *See also Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 399 (1979). Concurrent regulation of a bi-state agency's labor relations by the parallel and complementary laws of the settlor states, in a manner contemplated by their compact, does not have either effect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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